

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298

March 29, 2013

Agenda ID #12037

TO PARTIES OF RECORD IN PROPOSED RESOLUTION ALJ-288.

This is the proposed Resolution of Administrative Law Judge (ALJ) Irene K. Moosen. It will appear on the Commission's April 18, 2013 agenda. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed resolution, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own order. Only when the Commission acts does the resolution become binding on the parties.

You may serve comments on the proposed resolution. Opening comments shall be served no later than April 8, 2013. Service is required on all persons on the attached service list. Comments shall be served consistent with the requirements of Pub. Util. Code § 311(g) and Rule 14.5 of the Rules of Practice and Procedure.

Finally, comments must be served separately on Administrative Law Judge Moosen at im2@cpuc.ca.gov, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ KAREN V. CLOPTON

Karen V. Clopton, Chief
Administrative Law Judge

KVC:lil

Attachment

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-288
Administrative Law Judge Division

RESOLUTION

RESOLUTION ALJ-288 – Resolves the Appeal from Revocation of Escapade Transportation LLC’s Charter-Party Carrier Permit (PSG 26678).

SUMMARY

This Resolution resolves the Appeal from Revocation of Escapade Transportation (Escapade) LLC’s Charter-Party Carrier Permit (PSG 26678) issued on January 17, 2013 by the Commission’s Safety and Enforcement Division (SED) pursuant to its authority under Pub. Util. Code § 5387(c) and Resolution TL-19099. SED permanently revoked Appellant Escapade’s authority to operate under Pub. Util. Code § 5387(c)(1)(E) on the basis that Appellant Escapade had knowingly hired a driver without a required Student Pupil Activity Bus (SPAB) or school bus certificate for an SPAB charter. (Vehicle Code § 546.) Undisputed evidence presented at the Appeal Hearing demonstrated that the charter in question was not conducted under contract with a school. Vehicle Code § 546 is only applicable to charters conducted pursuant to a contract between a charter-party carrier and a school. We find that the charter giving rise to the revocation was not “an SPAB charter” as a matter of law. Consequently, we find no violation of Pub. Util. Code § 5387(c)(1)(E) occurred. The basis for the revocation was erroneous and it is hereby rescinded.

BACKGROUND

The Commission regulates charter-party carriers of passengers primarily pursuant to the Passenger Charter-Party Carriers’ Act (Pub. Util. Code § 5351, et seq.). Under Pub. Util. Code § 5387(c)(1)(E), a charter-party carrier shall have its authority to operate permanently revoked by the Commission if it commits the act of knowingly employing

a bus driver who does not have the required certificate.¹ Enforcement of Pub. Util. Code § 5387 (c) necessarily requires reference to another statute for determination of which “required certificate” Commission’s Safety and Enforcement Division (SED) determined was required of the driver who conducted the charter that gave rise to the revocation. Student Pupil Activity Bus (SPAB) is defined in Vehicle Code § 546.² Resolution TL-19099 provides the current procedural framework for permanent revocation of a charter-party carrier’s operating authority pursuant to mandate in Pub. Util. Code § 5387, et seq.³ In this case, SED revoked Appellant Escapade’s permit to

¹ Pub.Util. Code § 5387(c)(1)(E) provides: A charter-party carrier shall have its authority to operate as a charter-party carrier permanently revoked by the commission or be permanently barred from receiving a permit or certificate from the commission if it commits any of the following acts: . . .

(E) Knowingly employs a bus driver who does not have ...the required certificate to drive a bus.

² Vehicle Code § 546 provides, in pertinent part, that: A “school pupil activity bus” is any motor vehicle, other than a schoolbus, ...by a passenger charter-party carrier, used under a contractual agreement between a school and carrier to transport school pupils at or below the 12th-grade level to or from a public or private school activity, or used to transport pupils to or from residential schools, when the pupils are received and discharged at off-highway locations where a parent or adult designated by the parent is present to accept the pupil or place the pupil on the bus.

...

The driver of a school pupil activity bus shall be subject to the regulations adopted by the California Highway Patrol governing schoolbus drivers, except that the regulations shall not require drivers to duplicate training or schooling that they have otherwise received which is equivalent to that required pursuant to the regulations, and the regulations shall not require drivers to take training in first aid. However, a valid certificate to drive a school pupil activity bus shall not entitle the bearer to drive a schoolbus.

³ Pub.Util. Code § 5387.3 provides: (a) A charter-party carrier described in subdivision (c) of Section 5387, that has received a notice of ...revocation of its permit to operate, may submit to the commission, within 15 days after the mailing of the notice, a written request for a hearing. The charter-party carrier shall furnish a copy of the request to the Department of the California Highway Patrol at the same time that it makes its request for a hearing.

(b) Upon receipt by the commission of the hearing request, the commission shall hold a hearing within a reasonable time, not to exceed 21 days, and may appoint a hearing officer to conduct the hearing. At the

operate for knowingly employing a driver that did not have an SPAB certificate that was required for an SPAB charter.⁴

REVOCATION

On January 17, 2013, SED revoked Escapade's charter-party carrier permit by letter.

SED's revocation letter explained, in pertinent part:

A terminal inspection conducted by the Border Division Motor Carrier Safety Unit completed on October 31, 2012 resulted in an "unsatisfactory" terminal rating. Among one of the violations cited in the Safety and Compliance Report was the use of a driver (Brian Smith) who did not possess the appropriate SPAB certification or School Bus certification on a SPAB charter.⁵

The Commission regulates the operations and practices of charter-party carriers of passengers pursuant to the Passenger Charter-party Carriers' Act (Pub. Util. Code § 5351, et seq.). Under Pub. Util. Code § 5387(c)(1)(E), a charter-party carrier shall have its authority to operate permanently revoked by the Commission if it commits the act of knowingly employing a bus driver who does not have the required certificate to drive a bus. This is the authority cited by SED in revoking Escapade's operating authority.

APPEAL

School Pupil Activity Bus Certificate Requirement (Vehicle Code Section 546):

Appellant Escapade filed a timely appeal on the grounds that it did not violate Pub. Util. Code § 5387(c)(1)(E) because the charter giving rise to the violation was not an SPAB charter and therefore the driver was not required to have an SPAB or School Bus certificate to conduct the charter. The Commission granted the request for an Appeal

hearing, the burden of proof is on the charter-party carrier to prove that it was not in violation of subdivision (c) of Section 5387.

(c) The ...revocation of the permit to operate may only be rescinded by the hearing officer if the charter-party carrier proves that it was not in violation of subdivision (c) of Section 5387, and that the basis of the revocation resulted from factual error.

⁴ Exhibit 19 at 1.

⁵ *Id.*

Hearing. The Appeal Hearing took place on February 20, 2013. Mr. William Reck, President of Escapade Transportation LLC. appeared on his own behalf. SED appeared with Counsel. Briefs were filed in this case on March 6, 2013.

Appellant Escapade and SED stipulated to the fact that Escapade did not conduct the charter in question under contract with a school as part of a larger stipulation of undisputed facts received in evidence at the Appeal Hearing. (Joint Exhibit 1.) Stipulation #1 of Exhibit #1 states:

On September 29, 2012, a vehicle operating under the Escapade Transportation, LLC's TCP# 26678B transported school children (12th grade or below). The vehicle picked the children up across the street from Carlsbad High School, where a school Homecoming dance was held. The vehicle transported the children to various locations, and returned them to approximately the same location across the street from Carlsbad High School. There is no contract between Escapade Transportation LLC and Carlsbad High School or the school district for this event.

At hearing, Inspector Albach, author of the terminal inspection report on which SED relied in its revocation letter, testified that Vehicle Code Section 546 requires a contractual agreement between the charter-party carrier and a school. During Mr. Reck's questioning, Inspector Albach confirmed that an SPAB certificate was not required because the September 29th charter was not contracted by the school.

Inspector Albach: So your question is if the definition of SPAB is required to have a contractual agreement.

Mr. Reck: Yes.

Inspector Albach: Yes, it says that in 546. This is the legal definition to meet the requirements.

Mr. Reck: Okay. So if we were not contracted by the school, is SPAB required?

Inspector Albach: No.

Tr. at 57.

The testimony of Inspector Albach further clarified that SED's revocation letter was in error in stating that a driver and vehicle that were SPAB certified were required for the charter in question.⁶

The burden of proof in an Appeal from Revocation is on the charter-party carrier to prove that it was not in violation of subdivision (c) of Section 5387. (Pub. Util.

⁶ Tr. at 69-70.

Code § 5387.3(b)) The revocation of the permit to operate may only be rescinded if the charter-party carrier proves that it was not in violation of subdivision (c) of Section 5387 and that the basis of the revocation resulted from a factual error. (Pub. Util. Code § 5387.3(c)) The facts presented in the Joint Stipulation and confirmed by the California Highway Patrol witness, Inspector Albach's testimony are clear: SED erred in concluding that the charter in question was an SPAB charter that required a driver who possessed an SPAB certificate or a School Bus certificate and thereafter issuing a revocation on that basis. Appellant Escapade has met its burden of proof and the revocation should be rescinded.

School Bus Certification Requirements

SED's Brief did not address Appellant Escapade's Appeal argument. Instead, SED presented a new basis for revocation. SED argued that the charter in question required a school bus and that Appellant Escapade knew this requirement and still knowingly employed a driver that did not possess a school bus certificate. SED requested that the Commission affirm the original revocation based on this new assertion. The Commission has considered whether sufficient basis exists for affirming the revocation based on this theory and finds that due process requirements make it legally impermissible to do so, as we discuss below.

Due process requires, at a minimum, notice and an opportunity to be heard. The Commission applies the standard for due process notice articulated by the U.S. Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314:

An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citation omitted.] The notice must be of such nature as reasonably to convey the required information, [citation omitted], and must afford a reasonable time for those interested to make their appearance. . . .

Order Modifying D.01-09-060 and Denying Rehearing 2001 Cal. PUC
LEXIS 1196 (October 10, 2001.)

It is well settled that the type of notice required is dictated by the circumstances. Given the severity of the penalty for violation of Pub. Util. Code § 5387(c)(1)(E), that is, permanent revocation of operating authority, precision in notice is required. Application of this standard to the notice of revocation in SED's January 17, 2013 Letter shows that notice to be defective for purposes of the "school bus violation" argument presented in its Brief because that theory was foreclosed by SED's original notice of

revocation on the “SPAB violation” grounds. Moreover, the “school bus violation” arguments presented fully in SED’s Brief do not now provide proper notice since it was not concurrent with the deprivation of Appellant Escapade’s operating authority, that is, the January 17, 2013 Letter revocation. It is neither possible to amend the original revocation in this matter, nor initiate a new process in this way. Presenting a fully articulated basis for revocation in a Brief at the end of the Appeal Hearing process forecloses the possibility for Appellant to afford an opportunity to present objections and does not permit time to make an appearance. We discuss each of these defects as follows.

First, Appellant Escapade’s revocation relies upon knowingly employing a driver that did not possess an SPAB certificate or school bus certificate when one was required for an SPAB charter. Not only did the revocation not provide notice, either implicitly or explicitly, of a possible school bus violation as an alternative basis, such conclusion was foreclosed as a matter of law. The plain language governing “SPAB” (Vehicle Code Section 546) and “School Bus” (Vehicle Code Section 545) make these two categories mutually exclusive. In other words, an SPAB is never a School Bus and a School Bus is never an SPAB under the terms of these code sections.

A comparison of the plain statutory language makes this clear. As discussed above, Vehicle Code Section 546 defines the requirements for an SPAB stating, in pertinent part, “A “school pupil activity bus” is any motor vehicle, other than a schoolbus,...” Vehicle Code Section 545 states that a “schoolbus” is a motor vehicle designed, used, or maintained for the transportation of any school pupil at or below the 12th-grade level to or from a public or private school or to or from public or private school activities, *except the following: d) A school pupil activity bus.* (Emphasis added.) We conclude that because SED relied upon an SPAB violation for the revocation without any reference to alternative violations, it made this basis for the revocation exclusive as a matter of law. Finding proper notice of a violation of school bus requirements in the original January 17, 2013 letter is not possible under these circumstances.

Notice to Appellant Escapade was given in SED’s revocation letter in the following sentence:

Among one of the violations cited in the Safety and Compliance Report was the use of a driver (Brian Smith) who did not possess the appropriate SPAB certification or School Bus certification on an SPAB charter.” Exhibit 19.

We note that the mention of lack of a School Bus certificate does not change our conclusion. This reference is insufficient to support a finding of proper notice of violation based on schoolbus requirements under the Mullane standard that “[t]he

notice must be of such nature as reasonably to convey the required information.” The context of the revocation is “an SPAB charter.” Section 546 makes it clear that a schoolbus certificate holder can drive an SPAB but a driver with an SPAB is not entitled to drive a schoolbus.⁷ In Appellant Escapade’s case, if the driver on the charter in question had had a schoolbus certificate, it would have been sufficient to avoid a finding that an SPAB charter was conducted by a driver without the required certificate since a schoolbus certificate also satisfy Section 546 requirements as well as an SPAB certificate. We conclude that notice here is “of such a nature as reasonably to convey the required information” for purposes of an SPAB violation only. We find that it is logically and legally inconsistent and incomplete for notice of a revocation Vehicle Code Section 545 School Bus violation.

Second, we considered whether the full statement of the schoolbus violation theory in SED’s Brief meets the *Mullane* standard for due process notice. SED’s Brief does not comply with *Mullane* because it does not afford the Appellant Escapade an opportunity to present its objections nor a reasonable time to make an appearance since it comes at the close of the Appeal Hearing on the original revocation. Moreover, it would be fundamentally unfair to now extend the Appeal Process further to address these arguments on the merits. SED did not request leave to amend its revocation, nor was there evidence of any reason it could not have presented in the original revocation.

We find that SED’s presentation in its Brief on violations of “School Bus” requirements under the Public Utilities Code and the Vehicle Code cannot be heard on the merits because Appellant Escapade did not receive notice nor have an opportunity to be heard as described immediately above. The timing and manner of SED’s Brief violates the Commission’s minimum due process standards for fair notice and opportunity to be heard and therefore, cannot be considered.

SAFETY

The Commission has broad authority to regulate charter-party carriers, particularly with regard to safety concerns. (See, for example, Pub. Util. Code §§ 451, 5382, and § 5387.) We are mindful that the statutory scheme under which the revocation in this case arises is intended to secure the safety of charter-party carrier passengers and in particular, children. Today’s action in reinstating Appellant Escapade’s operating authority is consistent with our safety enforcement obligations. At the Appeal Hearing,

⁷ Vehicle Code § 546, in pertinent part, states: “ ...The driver of a school pupil activity bus shall be subject to the regulations adopted by the California Highway Patrol governing schoolbus drivers, except that regulations shall not require drivers to duplicate training or schooling that they have otherwise received which is equivalent to that required pursuant to the regulations.” See also Transcript, Witness Albach at 73-74.

Appellant Escapade's commitments to safety as its main focus in operating its transportation business and in particular, to certification, including SPAB and School Bus certification, for all future jobs involving transportation of 12th grade and below students provide additional support for this conclusion.⁸ Once reinstated, Appellant Escapade's operations will continue under the Commission's, the Department of Motor Vehicles' and the California Highway Patrol's on-going inspection and enforcement program for all charter-party carriers.

CONCLUSION

We conclude that undisputed evidence presented at the Appeal Hearing demonstrates that the charter in question was not conducted under contract with a school. Vehicle Code § 546 is only applicable to charters conducted pursuant to a contract between a charter-party carrier and a school. We find that the charter giving rise to the revocation was not "an SPAB charter" as a matter of law. Consequently, we find no violation of Pub. Util. Code § 5387(c)(1)(E) occurred. The basis for the revocation is erroneous and the revocation is rescinded.

SED presented an alternative basis for its revocation fully in its Brief. However, as discussed above, due process notice and hearing requirements were not met with respect to those arguments. Therefore, we cannot consider those arguments on the merits.

COMMENTS

Pub. Util. Code § 311(g)(1) requires that a draft resolution be served on all parties, and be subject to a public review and comment period of 30 days or more, prior to a vote of the Commission on the resolution. A draft of today's resolution was distributed for comment to the interested parties. The parties stipulated to a reduction in the review period pursuant to Rule 14.6 (b) of the Commission's Rules of Practice and Procedure. Accordingly, Comments were timely submitted on _____.

FINDINGS OF FACT

1. On September 29, 2012, Escapade conducted a charter of Carlsbad High School students. Escapade did not have a contract with a school for this charter.
2. The SED revoked Escapade's charter-party carrier permit TCP 26678 on January 17, 2013 citing a violation listed in the October 31, 2013 terminal inspection report for "use

⁸ Transcript, Witness Reck at 94.

of a driver (Brian Smith) who did not possess the appropriate SPAB certification or School Bus certification on a SPAB charter.”

CONCLUSIONS OF LAW

1. Pub. Util. Code § 5387(c)(1)(E) requires permanent revocation of a charter-party carrier’s operating authority if the carrier knowingly employs a bus driver who does not have the required certificate to drive a bus.
2. Vehicle Code Section 545 defines a “School Pupil Activity Bus” in relevant part, as “any motor vehicle, other than a schoolbus, operated by a common carrier...used under a contractual agreement between a school and carrier to transport school pupils at or below the 12th-grade level to or from a public or private school activity...”
3. SED erred in revoking Escapade’s authority for knowingly employing a driver who does not have an SPAB certificate. The charter in question was not an SPAB charter because it was not conducted under a contractual agreement with a school.
4. Because SED’s revocation only provided notice of a violation related to SPAB requirements, there was no notice to Escapade of any other basis for the revocation.
5. Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and must afford a reasonable time for those interested to make their appearance. . . ." SED did not provide notice of its theory that Escapade conducted a charter that required a schoolbus and a driver that was schoolbus certified until its Brief filed March 6, 2013 after conclusion of the Appeal Hearing. We are therefore prevented from reaching the merits of SED’s arguments presented in its Brief.
6. Escapade met its burden of proof to show that the revocation of its authority was based on factual error.
7. This Resolution is consistent with the Commission’s safety oversight and enforcement in regulation of charter-party carriers.

Therefore, IT IS ORDERED that the revocation of Escapade Transportation LLC’s charter-party carrier permit TCP 26678 is rescinded. It is hereby reinstated.

This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on _____, the following Commissioners voting favorably thereon:

PAUL CLANON
Executive Director

INFORMATION REGARDING SERVICE

I have provided notification of the foregoing Proposed Resolution ALJ-288 to the electronic mail addresses on the attached service lists, as well as hard copy by U.S. mail.

Dated March 29, 2013, at San Francisco, California.

/s/ LILLIAN LI

Lillian Li

SERVICE LIST

REVOCATION APPEAL (SED) NUMBER PSG 26678

Appellant

William Reck, President
Escapade Transportation LLC
4009 Crown Point Drive #12
San Diego, CA 92109

Irene K. Moosen
Administrative Law Judge
California Public Utilities Commission
505 Van Ness Avenue, Room 5103
San Francisco, CA 94102
E-mail: im2@cpuc.ca.gov

John Reynolds
California Public Utilities Commission
Legal Division
505 Van Ness Avenue
San Francisco, CA 94102
E-mail: jr5@cpuc.ca.gov

Gayle Pichierri
California Public Utilities Commission
Chief Court Reporter
505 Van Ness Avenue, Room 2106
San Francisco, CA 94102
Email: gp3@cpuc.ca.gov

Shonta Bryant
California Public Utilities Commission
Calendar Clerk
505 Van Ness Avenue, Room 5013
San Francisco, CA 94102
Email: sbf@cpuc.ca.gov

(END OF SERVICE LIST)